(32,149)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. HOYT, NORCROSS, CHENEY & HOYT, Reno, Nevada,
For the Plaintiff in Error.

Hon. GEORGE SPRINGMEYER, United States Attorney for the District of Nevada, Reno, Nevada, Hon. CHARLES A. CANTWELL, Assistant U. S. Attorney for the District of Nevada, Reno, Nevada, and Hon. GEORGE A. WHITELEY, Assistant U. S. Attorney for the District of Nevada, Carson City, Nevada,
For the Defendant in Error. [1*]

In the District Court of the United States of America in and for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN P. DONNELLEY,
Defendant.

INFORMATION FOR VIOLATION OF THE NATIONAL PROHIBITION ACT.

United States of America,
District of Nevada,—ss.

BE IT REMEMBERED, That George Spring-

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*Page-number appearing at foot of page of original certified Transcript of Record.

meyer, Esq., the Attorney of the United States for the District of Nevada, who prosecutes in behalf and with the authority of the United States, and with leave of Court first had and obtained, comes here in person into court at this October, 1924, term thereof, and for the United States gives the Court to understand and be informed that one John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 2d day of September, 1922, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of [2] one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the City of Reno, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley then and there having knowl-

edge, as aforesaid, of the said violations of the National Prohibition Act by the said James A. Curran, did wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 18th day of September, 1922, and before the filing of this information in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. [3] Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about the said 18th

day of September, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the "Rex Road House," situate in Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, then and there having knowledge, as aforesaid, of the said violations of the National Prohibition Act by the said James A. Curran, did wilfully, unlawfully and knowingly, and in violation of the National Prohibition, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 18th day of September, 1922, and before the filing of this information in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition [4] Director for the District of Nevada, appointed and

acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about the said 18th day of September, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the "Rex Road House," situate in Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, did then and there wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act fail, neglect and refuse to investigate the said violations of the said National Prohibition Act by the said James A. Curran, after the same were then and there reported to him, the said defendant, John P. Donnelley, by Richard Heap, Mrs. P. Nash and Jonathan Payne, and he, the said defendant, John P. Donnelley, did then and there wilfully, unlawfully and knowingly fail, neglect and refuse to arrest or cause the arrest of the said James A. Curran for the said violations of the said National Prohibition Act.

CONTRARY to the form of the statute in such

case made and provided, and against the peace and dignity of the United States. [5]

FOURTH COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 31st day of March, 1923, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one John Doe whose true name is unknown, in the unlawful possession by the said John Doe, for beverage purposes of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said March 31, 1923, in a garage between Quinn's Road House and the Rex Road House on the South Virginia Road, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, did then and there, wilfully, unlawfully and knowingly neglect to perform a duty enjoined upon him by law, to wit, the duty of investigating the said unlawful possession of said intoxicating liquor by the said John Doe, and of ascertaining the identity of and of causing the arrest of the said John Doe for the said offense, the facts concerning which were then and there duly reported to the said defendant

John P. Donnelley by Louis A. Spellier, Collector of Internal Revenue for the District of Nevada.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

GEORGE SPRINGMEYER,
United States Attorney. [6]

United States of America,
District of Nevada,—ss.

I, George Springmeyer, United States Attorney for the District of Nevada, being sworn, do say that the foregoing information is true as I verily believe.

GEORGE SPRINGMEYER.

Subscribed and sworn to before me this 16th day of January, 1925.

[Seal] E. O. PATTERSON,
Clerk.

[Endorsed]: Filed Jany. 16, 1925. [7]

[Title of Court and Cause.]

VERDICT.

We, the Jury in the above-entitled case, find the defendant, John P. Donnelley, —— guilty as charged in the first count of the information; not guilty as charged in the second count; not guilty as charged in the third count, and not guilty as charged in the fourth count.

Dated this 19th day of November, 1925.

W. H. WENNHOLD,
Foreman.

[Endorsed]: Filed this 19th day of November, 1925. [8]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

COMES NOW the above-named defendant, John P. Donnelley, and moves the Court for an order arresting judgment in the above-entitled cause upon the following grounds:

I.

That the Court has no jurisdiction to enter judgment upon the information.

II.

That the facts stated in the information do not constitute a public offense.

Dated, this 28th day of November, 1925.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 28th day of November, 1925. [13]

In the District Court of the United States for the District of Nevada.

October Term, 1925.

Honorable E. S. FARRINGTON, Judge.

No. 6555.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN P. DONNELLEY,

Defendant.

JUDGMENT.

Violation National Prohibition Act.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

An information has been filed against you, John P. Donnelley, charging you with having violated the National Prohibition Act by, while acting as Federal Prohibition Director for the District of Nevada, wilfully, unlawfully and knowingly failing to report knowledge of violations of the National Prohibition Act to the United States Attorney for the District of Nevada; and, while acting as such Federal Prohibition Director for the District of Nevada, wilfully, unlawfully and knowingly failing, neglecting and refusing to investigate the said violations of the National Prohibition Act; said crimes having been committed on the 2d day of September,

1922, the 18th day of September, 1922, and the 31st day of March, 1923, in Washoe County, State and District of Nevada, and within the jurisdiction of this Court. You were duly arraigned upon that information, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the first count of the information and not guilty as charged in the second, third and fourth counts. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not. [14]

In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you pay to the United States a fine in the sum of Five Hundred ($500.00) Dollars, and that you stand committed to the custody of the Marshal until the fine is paid, or in default of the payment of said fine that you be imprisoned in the county jail of Washoe County, Nevada, until the fine is paid or until you be otherwise discharged in due course of law.

Dated and entered Dec. 10, 1925.

Attest: E. O. PATTERSON,
Clerk.
By O. E. Benham,
Deputy. [15]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF THE DEFENDANT, JOHN P. DONNELLEY.

John P. Donnelley, the defendant in the above-entitled cause, by and through his attorneys, Messrs. Hoyt, Norcross, Cheney & Hoyt, in connection with his petition for writ of error, makes and offers the following assignment of errors, which he alleges occurred upon the trial of said cause:

1. That the verdict is contrary to law.

2. That the verdict is not supported by the evidence in the decree required by law.

3. That the first count of the information fails to allege, and does not set forth, facts sufficient to constitute a public offense, in violation of the National Prohibition Act, or any section or sections thereof, or any law of the United States.

4. That the Court erred in overruling defendant's motion for directed verdicts of not guilty made at the conclusion of the evidence offered upon the part of plaintiff.

5. That the Court erred in overruling defendant's motions for directed verdicts of not guilty made at the conclusion of the case and before final submission to the jury. [34]

6. That the Court erred in overruling the defendant's motion in arrest of judgment, in this, to wit:

> That the first count in the information, being the count upon which the verdict of guilty was found, fails to allege, and does not set forth,

facts sufficient to constitute a public offense, in violation of the National Prohibition Act, or any section or sections thereof, or any law of the United States.

7. That the Court erred in refusing to give defendant's requested instruction No. 1, reading as follows:

"The jury is instructed that the statute requiring reports to be made by the Federal Prohibition Director for the State of Nevada to the United States Attorney for this district reads: 'The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders.'

You are further instructed that the defendant was an assistant or agent of the Commissioner of Internal Revenue and, as such, it was his duty to report to the United States Attorney for the District of Nevada all offenses against the National Prohibition Act committed within such district where the offender or offenders are known to such Federal Prohibition Director."

8. That the Court erred in refusing to give defendant's requested instruction No. 2, reading as follows:

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an of-

fense has been committed [35] against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."

9. That the Court erred in refusing to give defendant's requested instruction No. 3, reading as follows:

"The jury is instructed that the defendant, as Prohibition Director, was not required to report to the United States Attorney a violation of the Federal Prohibition Act unless he had knowledge both of the violation of the act and the person or persons guilty of such violation; that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution."

10. That the Court erred in refusing to give defendant's requested instruction No. 4, reading as follows:

"The jury is instructed that unless you believe from the evidence, beyond a reasonable doubt, that on or about the 2d day of September, 1922, one James A. Curran was knowingly in possession of and transporting intoxicating liquor containing over one-half of one per cent of alcohol by volume, then your verdict should be for the defendant on the first count of the information for it is not a violation of the National Prohibition Act to have possession of and transport such intoxicating liquor with-

out knowing that the thing possessed and transported is such intoxicating liquor."

11. That the Court erred in refusing to give defendant's requested instruction No. 7, reading as follows:

"The jury is instructed that an arrest cannot lawfully be made by a Federal Prohibition Agent except in the case of an offense committed in his presence. Where the offense is not [36] committed in the presence of such officer the arrest to be lawful must be made upon warrant."

12. That the Court erred in refusing to give defendant's requested instruction No. 8, reading as follows:

"The jury is instructed that a Federal Prohibition Agent may not lawfully search a vehicle on or proceeding on a public highway or open packages contained therein or thereon without a search-warrant unless there is known to such officer probable cause for believing that such vehicle is carrying contraband or illegal merchandise."

13. That the Court erred in instructing the jury in the following particulars:

(a) In instructing the jury as follows:

"It was therefore his duty to investigate and report violations of the National Prohibition Act to the United States District Attorney. The violation which is alleged in the information, in all four counts, is a violation of section

3, Title II of the National Prohibition Act. That Section reads as follows:

'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect * * * transport or possess any intoxicating liquor, except as authorized in this act.'

There is nothing in the act which authorizes one to transport or possess intoxicating liquor on the Virginia highway south of Reno."

(b) In instructing the jury as follows:

"Section 33 is another section which has some bearing on this same situation:

'After February 1, 1920, the possession of liquors [37] by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title; * * * and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.'

So if one is in the possession of intoxicating liquor—and one who is transporting intoxicating liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary."

(c) In instructing the jury as follows:

"It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. That frequently happens. Men are murdered and we do not know who the murderer is; there is a crime nevertheless. Whiskey may be transported on a highway; you may find it in your automobile, but may not know who put it there; there is a violation of the law, but you don't know who the guilty party is.

In this case Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway."

(d) In instructing the jury as follows:

"In determining whether Curran knew anything about this, you [38] are not bound to accept his statement as conclusive; you are to view the circumstances; actions often speak very much louder than words. You will consider what he said at that time and place; you will consider the place itself; you will consider his story, and compare it with the story of other witnesses, Mrs. Menke for instance; you will consider his denial, consider all the facts connected with it, and determine whether he knew he had whiskey or not, whether he could transport this liquor, and whether it could be unloaded, and he could unload it from a broken

down truck and put it into another truck without some suspicion as to what he had. It is not necessary that he should be fully informed that this whiskey or beer, or whatever it was, contained one-half of one per cent or more of alcohol, because if it was beer it is prohibited by the statute."

(e) In instructing the jury as follows:

"So if he (Curran) knew that he had wine, knew that he had whiskey, knew that he had beer, he must be presumed to know the law. The statute prohibits the possession of beer."

(f) In instructing the jury as follows:

"Section 26 of Title II of the Act provides:

'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle or team or automobile, boat, [39] air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'"

(g) In instructing the jury as follows:

"The statute is the law as it is written, and when it says that an officer must report violations of the law, it means just what it says,

and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person or persons guilty of such a violation. The words undoubtedly were used advisedly by Congress when it approved that statute, and put in on the books."

(h) In instructing the jury as follows:

"The first count is that on or about the 2d day of September, 1922, and before the filing of this Information, Captain Donnelley was the Federal Prohibition Director for the State of Nevada, and that he then knew of the violation of the Prohibition Act by James A. Curran, who was at that time transporting and in possession of intoxicating liquor in an automobile on the South Virginia Road, about two miles south of Reno, and that he then and there had knowledge of the possession and transportation of the intoxicating liquor, and that he then and there failed to report the knowledge of said violation of the law to the United States District Attorney."

14. That the Court erred in failing to instruct the jury that the information must be proved, as laid, and that, in order to convict, it would be necessary for the Government to prove, as alleged in the information, that the defendant then and there had actual knowledge of violations of the National Prohibition Act by one James A. Curran, and that, then and there [40] having knowledge, as aforesaid, of said violations of the Na-

tional Prohibition Act by said James A. Curran, he did wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada.

15. That the Court erred in each and every particular of its general charge in this, to wit, that the Court should have withdrawn the issues from the jury and directed a verdict for the defendant.

WHEREFORE, the defendant prays that the judgment of said District Court may be reversed.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 10th day of Dec., 1925. [41]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause was duly tried before the Honorable E. S. Farrington, United States District Judge, and a jury duly impaneled and sworn.

BE IT FURTHER REMEMBERED, that testimony was received as follows: That the defendant was, at the times alleged in the information, Federal Prohibition Director for the State of Nevada; that about nine o'clock in the forenoon of September 2d, 1922, someone in the office of de-

fendant received a telephone call stating that there was a broken down truck on the main highway leading south from Reno, and about two miles therefrom, which, in the belief of the informant, contained a load of intoxicating liquor; that the defendant immediately sent five prohibition agents, Officers Nash, Toohey, Brown, DuBois and Scott, to investigate; that the said officers found one James A. Curran, then and now a drayman engaged in the business of drayage for hire in the city of Reno, at the place designated, about midway between the McKay residence and the Quinn and Rex [49] roadhouse; that prohibition agents by reason of reports received, possibly before September 2, 1922, had been watching Curran for some time; that Curran's truck was stalled on the highway, and Curran engaged in making some repairs to enable him to proceed towards Reno; upon the truck was found ten barrels, without any marks or inscriptions indicating the contents; that, in reply to interrogatories, Curran informed the officers that he knew nothing of the contents of the barrels; that he had responded to a telephone call and received the load from another disabled truck, the driver of which he did not know, but who had told him the load was from Tonopah and for him to haul it on his, Curran's truck to the latter's warehouse, where the driver of the disabled truck would later call for it; that a search-warrant had not been applied for or issued; that a United States Commissioner was then residing at Reno; that one of the officers broke open the

head of one of the barrels and removed therefrom three bottles having neither labels nor marks thereon; that one of the bottles was opened and its contents tasted by two or more of the officers; that Officer Scott, a witness for the plaintiff, testified that he was familiar with and could determine by the taste beer and near beer and would say it was beer and contained more than one-half of one per cent alcohol; that Officer Dubois, also a witness for the plaintiff, testified he could not tell the alcoholic content by mere tasting; that three of the officers then proceeded to Reno, taking the other two bottles for analysis; that the analysis was taken and showed an alcoholic content in excess of four per cent; that, upon completing the repairs to Curran's truck, it was driven by Curran, in company with two of the officers, to the City Hall of Reno, Nevada, where, after receiving the report of the analysis, the ten barrels of beer were [50] unloaded from the truck and placed in a Government vault, where the same were marked and labeled by one of the officers; that the defendant appeared at the City Hall shortly after the arrival of the truck and, after a conversation with Curran and with one or more of the officers, gave directions permitting Curran to depart with his truck; that Officer Nash, a witness for the plaintiff, testified that he asked the defendant if he had released Curran, and that defendant replied that there was no case against him, that Curran had told him he did not know what was in the barrels; that he, Nash, then took

the license number of Curran's truck and gave him his business card and said, "You know where my stand is"; Officer Dubois testified that he asked the defendant at the City Hall what he intended to do, and defendant replied that he would let him, Curran, go and let him take his truck, that we could get him at any time, and that he would take the matter up with Mr. Springmeyer. Mrs. Menke, a witness for the plaintiff, testified that she resided on the Reno-Carson highway about a fourth of a mile north of the McKay place, and on the opposite side of the highway; that, in the morning before ten o'clock A. M. of September 2, 1922, she had seen Curran drive his truck past her place, and shortly thereafter had seen him drive his truck out of the McKay place on to the highway, then turn north and pass her place going towards Reno; that thereafter, on the same morning, she had again seen him pass her place with his truck, going south, and shortly thereafter again saw him drive his truck out from the McKay place on to the highway, and that the truck had stalled just in front of her place and was there seized by prohibition agents; that the McKay place consisted of a residence, to the rear of [51] which was a garage; that a gate opened from the highway into a driveway leading to the garage; that about a hundred feet south of the driveway was a road connecting with the highway, and leading to a ranch to the west, which road formed the south boundary of the McKay property, and from which there was an entrance to the

rear of the McKay residence. Prohibition agents and the defendant testified that all field officers under defendant had general instructions to investigate and report to him violations of the National Prohibition Act; that the defendant did not make any director's case report or other written report relative to the Curran beer seizure to the United States Attorney; that a monthly report of the defendant, as Director of Prohibition, for the month of September, 1922, made to the Commissioner of Prohibition at Washington, and designed to show, among other things, a list of liquors seized, did not contain a reference to the beer seized from the Curran truck; that the beer seized from the Curran truck was destroyed by order of the United States District Court, made on March 5, 1923, the order containing the following descriptive language: "No case—ten barrels of beer."

That, in addition to the foregoing, testimony on behalf of plaintiff was given as follows: The witness Officer Nash testified that following the beer seizure he asked the defendant if he should make a case report, to which the defendant replied "No"; that George Springmeyer testified that he was United States Attorney for Nevada; that defendant had made no report to him, either oral or written, respecting the Curran matter and beer seizure; that he was not in his office on September 2d, 1922, after ten-thirty of the forenoon until late in the evening of that [52] day; that after ten-thirty he was out of his office, and might have been at his father's ranch in Carson Valley, or at

Lake Tahoe, or playing golf; that he never heard of the beer seizure from the Curran truck until March, 1923, when it was being destroyed by order of Court; that he did not see any newspaper account of this seizure.

The defendant, as a witness in his own behalf, testified that about twelve o'clock noon of the day of the seizure of the beer from the Curran truck, and prior to the release of Curran, he went to the office of United States Attorney Springmeyer and informed him of the seizure, and that he, Mr. Springmeyer, agreed with him in respect to the release of Curran; that an account of the seizure was published in the "Reno Evening Gazette" of September 2d, 1922; that the reason he did not make a director's case report to the United States Attorney was, "We didn't have a case; if we got evidence that Mr. Curran did know, why, we would complete our case and make a report"; that it was his custom not to make such a report where, in his judgment, there was not sufficient evidence, the case being considered under investigation until it was built up and completed; that the practice in the office was for the assistant director to prepare reports when ready for the director's signature; that the number of director's case reports made by defendant to the United States Attorney during the term he was Director—about two and a half years—was approximately five hundred; that, in connection with the cross-examination of defendant, plaintiff introduced in evidence a director's case report showing a seizure of a still

made upon search-warrant, where no one was found in possession and no arrest made, and containing a reference to a person named therein as being suspected of operating a still in the vicinity [53] and further investigation would be made; also, plaintiff introduced in evidence a director's case report showing a seizure, under search-warrant, of intoxicating liquor from the American Express Company, at Reno, addressed to Frank R. Mason, and that Eichelberger, manager, was requested to notify the office if Mason called for the package; also, plaintiff introduced in evidence a director's case report showing the seizure of a pint of whiskey and a Ford car from one Larkin and one Maupin, at Fallon, Nevada, Maupin being in the act of drinking out of a bottle, and no arrest made, together with correspondence between defendant and the United States Attorney's office, mutually agreeing that the case did not warrant prosecution; also, plaintiff introduced in evidence a director's case report showing the seizure of liquor at Reno, Nevada, from a room under the premises on 18 East Commercial Row and the detention of one George Billenman, the report also showing that Agent Scott had taken the matter up orally with the United States Attorney's office, and that Scott was informed by said office that there was no sufficient case; that Billenman was then released. The United States Attorney reported that no criminal proceedings would be instituted because of a defective search-warrant.

BE IT FURTHER REMEMBERED, that testimony was introduced as follows: Richard Heap, upon the part of the plaintiff, testified that on the 18th of September, 1922, he was a deputy sheriff of Washoe County, Nevada, serving in the capacity of a traffic officer on the Virginia highway leading south from Reno; that about eight o'clock of the evening of that day, while [54] riding his motorcycle on the highway north towards Reno, and while at a point about one hundred yards south of the McKay residence, he observed an autotruck approaching, driving south; that at a point opposite the McKay residence the driver of the truck extinguished the lights of the truck and turned into the road immediately to the south of the McKay residence; that he recognized the driver of the truck to be James Curran, and the truck to be the one used by him in his transfer business in Reno; that on this occasion the bed of the truck had boards on the sides, extending the same upwards about three feet from the manner in which the truck appeared when in transfer use in the streets of Reno; that the witness then immediately went to the residence of Percival Nash on the highway at South Virginia Street; that Mrs. Nash placed a telephone call for Jonathan Payne, Assistant Prohibition Director, at the latter's residence, and that he then talked with said Payne on the telephone; that the witness then returned to a point on the Virginia highway north of the McKay place, and saw Curran apparently drive out of the lane immediately south of the McKay

place on to the highway with his truck lights extinguished, and observed him then drive towards Reno; that he rode his motorcycle close to the rear of the truck and saw that the truck was loaded with barrels, and that a canvas cover was over the top of the barrels; that he followed the truck with his motorcycle to a point opposite the Rex roadhouse, adjoining the city limits, at which point the truck was turned off the highway to the west and to the side and rear of an auto service station on the highway and on the opposite side of the street from the Rex roadhouse; that he observed Curran leave the truck, cross the street and enter the Rex roadhouse; that it was then about ten [55] o'clock at night, and, as he was an hour over his working time, he proceeded on to his home; that at that time the state prohibition law was in force, of which he had knowledge; that the next day he went to defendant's office and asked defendant what he was going to do about the case, and that defendant said to him that he could not do anything about it or was not going to do anything about it until they saw what they were going to do with the truck-load of beer which had been seized previously, because he did not know whether he could make a case out of it or not; that he did not recall anything else that was said in that respect; that he just asked defendant what he had done in regard to the truck-load of booze he had reported, that is, the truck he had reported the night before; that defendant said he could not do anything about the matter because he did not know

whether he could make a case out of it until he saw what had become of the other truck-load of beer that had been seized; that he did not know what alcoholic content it contained.

Mrs. Percival Nash testified, for the plaintiff, that on the evening of September 18th Mr. Heap had called at her residence that all the prohibition agents were out of town, and that she phoned to Assistant Director Johnathan Payne, and that Mr. Heap talked to him on the phone.

George Springmeyer testified for the plaintiff that he was United States District Attorney for the State of Nevada; that defendant had appeared before a grand jury prior to the filing of the information and had stated or testified, in reply to a question propounded to him, that "Mr. Payne, his Assistant Director of Prohibition, had reported the matter to him the night of September 18, 1922, and that he had not done anything about it and that it was no business of mine whether it was a part of [56] the McKay supply of liquor or not; that he would run his office without any interference by me." Upon cross-examination the witness testified that the defendant said to the grand jury: "Mr. Payne had reported to him on the night of September 18, 1922, that Curran had a truck-load of intoxicating liquor on the Virginia highway that night, but he, Mr. Donnelly, had not done anything about it; that it was none of my business whether it was a part of the McKay supply of liquor or not, and that he would run his own

office." The witness further testified that his relations with the defendant were unfriendly.

The defendant testified that he did not recall a conversation with Mr. Heap, but that, in any event, he made no statement to him to the effect that he did not know the alcoholic content of the beer seized from the Curran truck on September 2d; that many reports came to the office daily with reference to violations or suspected violations of the Prohibition Law; that it was the practice of the office to make a memorandum at the time of all such reports, and at nine o'clock of the forenoon of each day the prohibition agents would meet at the office, when reported violations were called to their attention; that he had appeared as a witness before a grand jury prior to the filing of the information upon which he was upon trial and was sworn as a witness; that he did not testify before said grand jury that Mr. Payne had made any report to him on the night of September 18, 1922, relative to the Curran matter testified to by Richard Heap, and that he did not testify that Mr. Payne had reported to him at that time that Curran had a truck-load of intoxicating liquor on the Virginia highway that night, and that he did not testify that he, Donnelly, had not done anything about it, and that he did not testify that it was none of the business of Mr. Springmeyer [57] whether it was a part of the McKay supply of liquor or not.

BE IT FURTHER REMEMBERED, that Louis A. Spellier, Collector of Internal Revenue, District

of Nevada, on behalf of the plaintiff, testified as follows: That on or about March 31, 1923, he reported to the defendant that certain parties had informed him, Spellier, that a quantity of bonded liquor and beer had been stored in a garage or outbuilding at the rear of the Rex roadhouse, on the South Virginia Road; that the party who conveyed the information to him lived in that vicinity, and had reported that this garage was constantly under guard by a Chinese or Japanese, and that he, Spellier, at that time drew a sketch, as near as he could recall, of the premises.

On cross-examination Spellier testified that he did not tell the defendant who the party informing was; that the information given him was given by George Springmeyer, and that he, Spellier, had no direct knowledge of it at all. On redirect examination Spellier testified that the report was made to the defendant at his private office, no one else being present; that he could not give defendant's exact words, but that the defendant said the matter would either be looked into or would be taken up at once, he didn't recall which.

That the defendant, testifying upon this matter, said he had no personal recollection of the report made to him by Spellier, but had no doubt of the correctness of Spellier's testimony.

That, while George Springmeyer, United States Attorney, was testifying, he was asked the following question:

> "As to the offense of March 31, 1923, reported or testified to by Mr. Spellier as having

been reported to Mr. Donnelley, do you recall whether Mr. Donnelley made any statement before the Federal Grand Jury relative to [58] that matter?"

to which he gave the following answer:

"He said that Mr. Spellier had reported it to him, and when he was asked how it was that the liquor was moved on the night of the very day that it was reported to him by Mr. Spellier, that it was none of my affair, or none of my business, as to whether it was a part of the McKay supply of liquor or not, and he said he had not made any investigation of the matter whatsoever."

The defendant testified that he did not state or testify before the grand jury that Mr. Spellier had reported the matter of March 31st, 1923, to him; that he did not testify that it was none of his, Springmeyer's, affair as to whether it was a part of the McKay supply of liquor or not; that he did not testify that he had not made any investigation of the matter whatever.

The witness Springmeyer and the defendant each testified that no report, either oral or written, had been at any time made to the office of the United States Attorney by the defendant relative to either the matter reported by Heap or the matter reported by Spellier. [59]

BE IT FURTHER REMEMBERED, that upon the conclusion of the introduction of evidence upon the part of the plaintiff, and again upon the conclusion of the introduction of evidence upon the entire

case, but not until after the completion of the opening argument of counsel for the plaintiff, defendant moved the Court for a directed verdict of not guilty in respect to the first count of the information and in respect to the other counts thereof, upon the ground that the evidence was insufficient to support a verdict of guilty; that said motions, and each of them, were denied, to which the defendant took his exceptions.

BE IT FURTHER REMEMBERED, that the defendant requested the Court to give certain requested instructions, which were refused by the Court, said requested instructions being as follows:

No. 1.

"The jury is instructed that the statute requiring reports to be made by the Federal Prohibition Director for the State of Nevada to the United States Attorney for this district reads: 'The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders.'

You are further instructed that the defendant was an [60] assistant or agent of the Commissioner of Internal Revenue and, as such, it was his duty to report to the United States Attorney for the District of Nevada all offenses against the National Prohibition Act committed within such district where the offender or offenders are known to such Federal Prohibition Director."

No. 2.

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."

No. 3.

"The jury is instructed that the defendant, as Prohibition Director, was not required to report to the United States Attorney a violation of the Federal Prohibition Act unless he had knowledge both of the violation of the act and the person or persons guilty of such violation; that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution."

No. 4.

"The jury is instructed that unless you believe from the evidence, beyond a reasonable doubt, that on or about the 2d day of September, 1922, one James A. Curran was knowingly in possession of and transporting intoxicating liquor containing over one-half of one per cent of alcohol by volume, then your verdict should be for the defendant on the first count of the information for it is not a violation of the National [61] Prohibition Act to have possession of and transport such intoxicating liquor without knowing that the thing possessed and transported is such intoxicating liquor."

No. 7.

"The jury is instructed that an arrest cannot lawfully be made by a Federal Prohibition Agent except in the case of an offense committed in his presence. Where the offense is not committed in the presence of such officer, the arrest to be lawful must be made upon warrant."

No. 8.

"The jury is instructed that a Federal Prohibition Agent may not lawfully search a vehicle on or proceeding on a public highway or open packages contained therein or thereon without a search-warrant unless there is known to such officer probable cause for believing that such vehicle is carrying contraband or illegal merchandise."

BE IT FURTHER REMEMBERED, that the Court instructed the jury as follows:

"The COURT.—I do not suppose any one will dispute the proposition that this has been a very long trial; and while the Court may have manifested some impatience during the progress of the trial as to its length, I think it is proper to say that counsel have a duty to perform to their clients; it was for them to present the issues in this case, and to present the testimony in such a way that the issues might be understood, and that all the facts which were necessary in order to decide those issues should be presented fully and clearly to the Court and to the jury. The case is an important one in many respects: first, on account of the character and position of those who are involved [62] in it; and the issues themselves are decidedly serious;

they are serious to the public; they are serious as affecting the enforcement of law, and the enforcement of law is a great and important business of courts and of juries.

Four charges, those contained in the information, are charges against the defendant of distinct violations of a duty which he owed because of his official position as Prohibition Director for Nevada. That is a matter which you will keep distinct throughout the trial.

The first count is that on or about the 2d day of September, 1922, and before the filing of this information, Captain Donnelley was the Federal Prohibition Director for the State of Nevada, and that he then knew of the violation of the prohibition act by a man named James A. Curran, who was at that time transporting and in possession of intoxicating liquor in an automobile on the South Virginia Road, about two miles south of Reno, and that he then and there had knowledge of the possession and transportation of the intoxicating liquor, and that he then and there failed to report the knowledge of said violation of the law to the United States District Attorney.

The second count is somewhat similar. It alleges that on the 18th day of September, this man Curran was again transporting intoxicating liquor along the Virginia highway; that this fact was subsequently known tc the defendant Donnelley, and that he failed to report that violation to the District Attorney.

The third count deals with the same transaction;

that is, on the 18th day of September, 1922, Curran was then transporting intoxicating liquor, and Captain Donnelley knew of it, and wilfully and knowingly and in violation of the National Prohibition Act, failed, neglected and refused to investigate the [63] violation of the said National Prohibition Act by the said James A. Curran.

The fourth count relates to the 31st day of March, 1923. There the allegation is that the defendant had knowledge of the violation of the National Prohibition Act by one John Doe, whose true name is unknown, in the unlawful possession by the said John Doe of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about that date; and that he failed and refused to investigate the unlawful possession of said liquor, concerning which the facts had been reported to him by Louis A. Spellier.

Section 2, Title 11 of the Prohibition Act relates to the duties of the Prohibition Director, and reads as follows:

> 'The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of this act to the United States Attorney for the District in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General as in the case of other offenses against the laws of the United States.'

Now, Captain Donnelley was one of the officers upon whom the duty lay under the section which I

have read. It was therefore his duty to investigate and report violations of the National Prohibition Act to the United States District Attorney.

The violation which is alleged in the information, in all four counts, is a violation of section 3, Title 11 of the National Prohibition Act. That section reads as follows:

> 'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect * * * transport or possess any intoxicating liquor, except as authorized in this act.'

There is nothing in the act which authorizes one to transport or possess intoxicating liquor on the Virginia highway south of Reno. [64]

There is another section to which perhaps I had better call your attention, Section 26:

> 'When the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law.'

Section 33 is another section which has some bearing on this same situation:

> 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged,

given away, furnished, or otherwise disposed of in violation of the provisions of this title; * * * and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.'

So if one is in the possession of intoxicating liquor—and one who is transporting liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary.

In order to warrant a conviction for the violation of this act, the possession must be a conscious possession. A man cannot slip a bottle of wine or whiskey into your suitcase, and you carry it not knowing it is there, and be guilty. It is a violation of the law to have possession of whiskey, but under our criminal statutes and our criminal practice, there must not only be a criminal act but a criminal intent, and unless a man intends to violate the law he is not guilty of a violation. In all these criminal cases the usual instruction to the jury is that you must first find whether there has been a violation of the law; and if you find there has been a violation, then it is incumbent upon you to determine whether the defendant is the [65] person who violated it.

It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. That frequently happens. Men are murdered, and we

do not know who the murderer is; there is a crime nevertheless. Whiskey may be transported on a highway; you may find it in your automobile, but you may not know who put it there; there is a violation of the law, but you don't know who the guilty party is.

In this case if Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway.

In determining whether Curran knew anything about this, you are not bound to accept his statement as conclusive you are to view the circumstances; actions often speak very much louder than words. You will consider what he said at that time and place; you will consider the place itself; you will consider his story, and compare it with the story of other witnesses, Mrs. Menke for instance; you will consider his denial, consider all the facts connected with it, and determine whether he knew he had whiskey or not, whether he could transport this liquor, and whether it could be unloaded, and he could unload it from a broken down truck and put it into another truck without some suspicion as to what he had. It is not necessary that he should be fully informed that this whiskey or beer, or whatever it was, contained one-half of one per cent or more of alcohol, because [66] if it was beer it is prohibited by the statute.

Section 1 of the act defines what is meant by intoxicating liquor:

> 'The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes.'

So if he knew that he had wine, knew that he had whiskey, knew that he had beer, he must be presumed to know the law. The statute prohibits the possession of beer.

There are several requested instructions which I will read:

> 'Section 2 of Title 11 of the Act provides:
>
> "The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violation of this act to the United States Attorney for the district in which committed, who is herey charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States."
>
> 'The Prohibition Director is included among the officers who must investigate and report violations of the act to the United States Attorney.'

'Section 26 of Title 11 of the act provides'—I have already read this from the book:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle or team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

'You are instructed that you are the sole judges of the facts. The law you must take from the Court. You are not [67] to consider any matters of sympathy or bias or prejudice. The matter of punishment, if any, is solely within the province of this Court, and it must not be considered by you in deliberating upon your verdict.'

You are instructed that whatever I may have said with reference to the facts in this case, or any intimation I have made during the progress of this trial as to what the evidence shows, is not controlling. You are to apply your own judgment to what has been testified to here, to what has been said by counsel and to what has been said by the Court; and if it is not approved by your judgment as being

correct, you are not at liberty to follow it. You must determine by your judgment what the testimony proves; if you follow what the Court has said or what counsel have said with reference to what the testimony proves and what the facts are, in contradiction to your own judgment, you are not doing your duty. As to the law, you are bound to accept whatever statements the Court makes as to the law. If I make a mistake it is my mistake, a mistake for which I alone am responsible.

There has been a vast amount of testimony introduced here, and a number of witnesses have been called to enlighten you as to what the facts are. You are to consider the testimony of each witness; you cannot reject the testimony of any one of the witnesses simply because he has been mistaken, or been inaccurate, but if you find such is the case, that a witness has been mistaken, it would warrant you in examining his testimony with more care than you otherwise would. If a witness has deliberately stated that which is untrue as to a material matter in the case, where he has not been corroborated by other credible evidence in the case, [68] you are at liberty to disregard the whole of his testimony. You are to weigh the testimony of each witness, and of all the witnesses, in the same scales. The testimony of one witness may weigh more than the testimony of another; and in determining how much credibility and how much weight you will give to the testimony of any witness, you are at liberty to consider his motives, if any motives have been disclosed. You will consider the reasonableness and

the probability of his story, whether it rings true; and you can consider the witness himself. As I have said here repeatedly, every witness who appears upon the stand is himself an exhibit; you examine the witness and determine from his appearance and his demeanor and his apparent candor or lack of candor, just as you would in ordinary life, how much weight his testimony is entitled to, and how much credence you will give to his story.

There have been frequent contradictions in the testimony; those are for you to solve, and to determine what the truth is; that is what you are here for; your sole purpose here is to determine what is the truth, and by your verdict to give effect to the truth. There has been considerable testimony as to character; and testimony as to good character is permissible testimony in every case of this kind; it is to be considered by you with all other testimony; all the testimony, including the testimony of good character or bad character, is to be weighed together, all the evidence in the case, and upon that, after considering it all, you are to determine whether it shows that the defendant is guilty or not guilty.

The defendant in every case is presumed to be innocent until his guilt is proven beyond a reasonable doubt. A reasonable [69] doubt is a substantial doubt; it is just what the term indicates; it is a reasonable doubt; it is not a possible doubt, it is not a mere suspicion or possibility, but it is a reasonable doubt, such a doubt as would govern you in the more weighty affairs of life. If after a careful consideration of all the testimony there is

such a reasonable doubt, such a substantial doubt in your mind as to the guilt of the defendant, it is your duty to bring in a verdict of not guilty. That presumption of innocence and that rule of reasonable doubt is to be applied to the indictment, it is to be applied to each count in the information, and you are to determine as your judgment dictates, after considering all the testimony in the light of the instructions I have given, whether the charge in the indictment and in each count, and in the information has been proven.

There has been considerable testimony introduced here with reference to the custom of the office, and the manner of making the reports, but I must instruct you now that a statute cannot be modified or repealed by the custom or the manner in which any officer performs his duty. The statute is the law as it is written and when it says that an officer must report violations of the law, it means just what it says, and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person or persons guilty of such a violation. The words undoubtedly were used advisedly by Congress when it approved that statute, and put it on the books.

I don't know, Gentlemen, that there is very much more I can say that will be of assistance to you, but as I said in the beginning this is an important case; we have been a long time trying [70] it; you have heard very patiently a vast amount of testimony; you have seen a great number of wit-

nesses, and have had an opportunity to study them. You will remember that you are here to perform a very important duty; it is a very solemn duty; you are bound under the same oath as the Court, and you are to decide this case according to the law and the evidence. The one thing for you to determine is whether there has been a violation of the law, and whether the defendant has violated it, remembering all the while the presumption of innocence, and that the burden is upon the Government to show his guilt beyond a reasonable doubt, from the evidence.

I think I can safely leave this case to you now, as twelve honest, impartial men, who are willing to decide it, not according to your prejudice, not according to your sympathy but simply to determine whether the law has been violated."

BE IT FURTHER REMEMBERED, that immediately following the giving of the instructions and before the final submission of the case to the jury, the defendant excepted to the refusal of the Court to give defendant's requested instructions, one to four and seven to eight, both inclusive, upon the ground that they contained a correct statement of the law, and based on the theory that the defendant could not be found guilty of a failure to report, unless Curran was guilty also; that the defendant excepted to the instructions given by the Court, and each and every part thereof, the effect of which was to instruct the jury that it was the duty of the defendant to report to the District Attorney violations of the National Prohibition Act,

regardless of knowledge of who the offender or offenders were; that the instructions given by the Court were to the [71] effect that they could find the defendant guilty, irrespective of guilt upon the part of Curran; that the defendant further took his special exception to that portion of the Court's charge in respect to *prima facie* evidence and the burden of proof, as provided in section 33 of the statute read to the jury, in that the same was not applicable except in cases of possession of liquor under circumstances other than transportation, and then applicable only in a case where the possessor was the defendant on trial.

BE IT FURTHER REMEMBERED, that on the conclusion of the trial a verdict of guilty was found by the jury against the defendant in respect to the first count of the information, and verdicts of not guilty in respect to the second, third and fourth counts thereof, to which verdict of guilty the defendant took his exception.

BE IT FURTHER REMEMBERED, that, after the jury had rendered a verdict of guilty, as charged in the first count of the information, the defendant filed a motion in arrest of judgment, as follows:

"I.

That the Court has no jurisdiction to enter judgment upon the information.

II.

That the facts stated in the information do not constitute a public offense."

That said motion in arrest of judgment was by the Court overruled, to which the defendant took his exception.

BE IT FURTHER REMEMBERED, that, thereafter, and before pronouncing sentence, the defendant moved the Court for a new [72] trial of said cause, upon the following grounds:

That the Court misdirected the jury in matters of law;

That the Court erred in the decision of questions of law arising during the course of the trial and excepted to by the defendant;

That the verdict is contrary to law;

That the verdict is contrary to the evidence;

That said motion for a new trial was by the Court overruled, to which the defendant took his exception.

BE IT FURTHER REMEMBERED, that, thereafter, and on the 10th day of December, 1925, the Court rendered its judgment and sentence on said verdict of guilty and adjudged that the defendant be fined in the sum of five hundred dollars, and that he be confined in the County jail of Washoe County, Nevada, until such fine be paid, to which judgment the defendant took his exception.

BE IT FURTHER REMEMBERED, that an order was entered in the minutes of the court, giving to the defendant ten days from the 10th day of December, 1925, to file his proposed bill of exceptions in said cause; that within said time defendant tendered and filed his proposed bill of exceptions,

to which plaintiff interposed and filed certain objections and proposed amendments; that thereafter, and on the 29th day of January, 1926, the proposed bill of exceptions, objections and proposed amendments coming on to be heard before the court, the court made its order settling the bill of exceptions, and by further orders gave the defendant to and including the 11th day of February, 1926, to file an engrossed copy of the bill of exceptions as so settled and allowed, and that the within and foregoing is such engrossed copy, and is defendant's bill of [73] exceptions.

And now, in furtherance of justice, the defendant tenders and presents the foregoing as his bill of exceptions as settled and allowed by the Court in this case to the action of the Court in the various particulars therein set forth, and as containing a correct statement of the proceedings in said cause at the trial and of the material evidence introduced thereon in respect to the first count of the information, upon which a verdict and judgment of guilty were found and entered, requested instructions upon the part of the defendant refused by the Court and all the instructions given by the Court in respect to, or having any bearing upon, the charges contained in the information, and prays that the same may be settled, allowed, signed and sealed by the Judge of this court and filed and made a part of the record, and the same is ac-

cordingly done this, the 11th day of February, 1926.

E. S. FARRINGTON,
Trial Judge.

Stipulated to be correct.

CHAS. A. CANTWELL,
Assistant United States Attorney,
Attorneys for Plaintiff.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 11th day of February, 1926. [74]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. John P. Donnelley, Defendant, said case being No. 6555 on the docket of said court.

I further certify that the attached transcript, consisting of 78 typewritten pages numbered from 1 to 78, inclusive, contains a full, true and cor-

rect transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $30.50, has been paid to me by Messrs. Hoyt, Norcross, Cheney & Hoyt, attorneys for the defendant in the above-entitled cause.

And I further certify that the original writ of error and [77] the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court, this 2d day of March, A. D. 1926.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

[78]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in the District Court before you, between the United States, Plaintiff, vs. John P. Donnelley, Defendant, a manifest error hath happened, to the great damage of said defendant, John P. Donnelley, as by this complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of [82] Appeals for the Ninth Circuit, together with this writ, so that you have the same in the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 10th day of December, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] E. O. PATTERSON,
Clerk of the United States District Court, District of Nevada.

Allowed by:

E. S. FARRINGTON,
Judge. [83]

[Endorsed]: Filed this 10th day of December, 1925. [84]

[Endorsed]: No. 4794. United States Circuit Court of Appeals for the Ninth Circuit. John P. Donnelley, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed March 3, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4794.

JOHN P. DONNELLEY,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

STIPULATION UNDER RULE 23.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-

entitled cause that the parts of the record necessary for the consideration of the assignments of error of the above-named plaintiff in error, as set forth in the record prepared by the Clerk of the United States District Court for the District of Nevada, in the above-entitled cause, are as follows:

Information.
Verdict.
Judgment.
Motion in Arrest of Judgment.
Assignment of Errors.
Bill of Exceptions.
Writ of Error.
Certificate of Clerk.

That in pursuance of the provisions of Subdivision 8 of Rule 23, the Clerk of the above-entitled court shall print those parts of the record only as above designated.

Dated this 10th day of March, 1926.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Plaintiff in Error.
GEORGE SPRINGMEYER,
U. S. Atty.
CHAS. A. CANTWELL,
Asst. U. S. ATTY.,
GEO. A. WHITELEY,
Asst. U. S. ATTY.,
Attorneys for Defendant in Error.

[Endorsed]: Stipulation Under Rule 23. Filed Mar. 11, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

SUPREME COURT OF THE UNITED STATES

ORDER TO SEND UP ENTIRE RECORD AND CAUSE—October 24, 1927

It is ordered that this cause be restored for reargument.

It is further ordered that the entire record in this cause be certified up to the Court in accordance with section 239 of the Judicial Code, as amended by the act of February 13, 1927 (43 Stat. 936), so that the whole matter in controversy may be considered by the Court, and the case is hereby set down for hearing on the 21st day of November next.

October 24, 1927.

Minute entry of argument and submission, May 18, 1926, omitted in printing.

Certificate of question to Supreme Court omitted in printing; printed under separate cover.

Clerk's certificate to foregoing transcript omitted in printing.

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State vs. Col. Inc. Co., 124 N. W. (Wis.) 502
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United States vs. Reese, 92 U. S., 14
U. S. vs. Seibert, 2 Fed. (2nd) 80
United States vs. Wiltberger, 5 Wheat., 76
25 R. C. L., 1083 and cases cited

In the Supreme Court of the United States

JOHN P. DONNELLY,
Plaintiff in Error,
—vs—
UNITED STATES OF AMERICA,
Defendant in Error,

No. 582
October Term, 1926
On Certified Question of Law

BRIEF FOR PLAINTIFF IN ERROR

QUESTION SUBMITTED

Omitting title of cause and unnecessary verbiage the

> "Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code."

reads:

> "The first count of the information in this case charges than 'on or about 2d day of September, 1922, * * * in Washoe County, State and District of Nevada, * * * then and there being an officer of the United States, namely, Federal Prohibition Director for the District of

Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors * * * did willfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge * * * to the United States Attorney for the District of Nevada, * * *'

"The information contained three other counts of like import, but as to the latter the jury returned a verdict of not guilty. A verdict of guilty was returned as to the first count only, and the judgment on the verdict is now before the above entitled court for review on writ of error.

"Section 2 of Title II of the National Probihibition Act provides:

" 'The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting of offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; * * *'

"Section 29 of the same Act and Title provides:

" 'Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined

for a first offense not more than $500; for a second offense not less than $100 nor more than $1000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.'

"The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

"Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, Agents or inspectors to reports violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the District in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II, within the true intent and meaning of Section 29 of said Act and Title?"

ARGUMENT

Section 2 of the National Prohibition Act clearly was never intended by Congress to define or embrace a penal offense.

An attempt so to construe the section as to give it a penal character, leads to absurd results. So construed, the Commissioner of Internal Revenue, his assistants, agents and inspectors, are guilty of a misdemeanor if they fail to investigate and report any violation of the Act coming to, or which should have come to, their knowledge. A third derelection would amount to a felony.

The section, so construed, does not stop with making possible criminals out of the Commissioner and other administrative officers mentioned in the Act,

but the United States Attorney is made equally guilty if he fails to prosecute.

So construed, it becomes the duty of the Commissioner, his assistants, agents and inspectors, not only to investigate offenses in connection with liquor violations, but each must investigate every other officer with whom he is associated and report him if such officer has failed so to investigate and report.

For example, apply the section so construed to the facts of the case at bar. Plaintiff in Error, as shown by the record, sent five of his Prohibition Agents to investigate the alleged offense concerning which he was informed against. Each of such agents was as cognizant of the facts as was the Plaintiff in Error. None of them reported the offense to the United States Attorney. Here, then would be five other offenses committed. But that is not all—Plaintiff in Error should have reported the fact that each of his five subordinate officers had failed to report, and for not doing so he would have committed five additional offenses. The section is not even yet satisfied. Each of the five agents should have investigated and reported the failure of their superior officer and for not so doing each would be guilty of an additional offense. Still the section would not be complied with. Each agent should have investigated and reported on his four associates adding four additional offenses to each agent. Add to these the failure of the United States Attorney to prosecute each offense and we would have about seventy-one offenses growing out of the one incident still subject to prosecution, without considering what other officers in the Director's or Commissioner's office might be enmeshed.

It is manifest that Congress never intended any such a ridiculous construction to be placed upon Section 2 of the Prohibition Act.

The section is a purely administrative provision prescribing in the most general language, and not with the particularity required in penal provisions, the duty of administrative officers in investigating and reporting such violations of the Act as are by its terms made "offenses."

If Section 2 of the Act is penal in character, then Congress intended to take all discretion from officers entrusted with enforcement, and they cannot, as has been the practice, without themselves becoming violators, determine what class or character of violators it is most advantageous, for the purpose of real enforcement, to investigate and report, nor determine in any case under investigation when or whether evidence has been secured sufficient to justify prosecution. Congress clearly intended nothing of the kind.

Section 38 of the Prohibition Act provides for three classes of officers, two of which are specifically designated as "executive officers" and as "agents and inspectors in the field service" and the third class includes experts, clerical assistants, etc.

By the very terms of the statute executive officers have nothing to do with the real work of investigating officers. True, they have general direction over such officers and in practice, as is necessary if efficiency is to be considered, have in a large measure, control of the character and scope of their labors—a course they could scarcely pursue if Section 2 were penal.

By the provisions of Sections 1800 and 1810 of Article XVIII of the Regulations prescribed by the Commissioner of Internal Revenue, the Director must maintain an office not to be closed within certain prescribed hours and must be in attendance except on leave or temporary absence. By the terms of the Regulations the Director cannot be an investigating officer in the strict or practical sense. Upon the other hand it is equally as manifest that investigating or field officers are not supposed to make reports to the United States Attorneys of the results of their investigation, which is the appropriate function of the directing officers under whatever name designated.

If Section 2 is penal, it is not enough for an officer either to investigate or report; he must do both, regardless of the general character of his duties, and this of course, applies to the Commissioner of Internal Revenue especially.

If, as was the contention of the Government in the courts below, Section 2 made it the duty of prohibition officers to report offenses even though the offender was unkonwn, then Congress must have intended that such officers should be engaged chiefly in the fruitless task of making reports of mere offenses. While we think this view clearly erroneous, it serves to emphasize the unreasonableness of construing Section 2 as embracing a penal offense.

Section 2 fails to say when reports shall be made. An offense may be discovered, but is may take weeks, months, or even years, to discover the offender and secure evidence to justify prosecution. Must an efficient officer report bare knowledge of an offense,

and thus frustrate efforts to discover the perpetrator, or may he exercise his judgment as to when is the proper time to report? Is a prohibition officer subject to prosecution because his judgment happens to differ from that of a United States Attorney as to when an offense should be reported?

What purpose could be served by reporting knowledge of mere offenses to the United States Attorney, whose duty it is to prosecute "the offenders"? The section does not even provide that the reports shall be in writing.

If Section 2 is penal in character then a prohibition director or other prohibition officer may be seriously handicapped in his labors by an unfriendly prosecuting attorney or by one of his own subordinate officers. If it were necessary, concrete examples, we think, could be shown. It probably would not be difficult, in the case of every directing prohibition officer in the country, to find cases of known violations which were unreported. The more efficient the officer, probably the greater number of cases which were ignored in order that time and effort might be devoted to those of more importance.

Section 2 contains not a single characteristic of a penal statute. Few reading it would ever suspicion that it might be so intended. Even if it had included a specific provision that a violation of it would constitute an offense, an officer could not tell what he would have to do to comply with its terms so as to be immune from punishment.

It is conceded that a violation of Section 2 would not constitute an offense, unless, as contended, it is made so by Section 29. It is respectfully submitted,

that a reading of Section 29 discloses that Congress never intended that section to apply to the purely administrative provisions of the Act.

Section 29 after specifically referring to offenses such as "violating the provisions of any permit," the making of "false records, reports or affidavits required by this title"—all of which appertain to the manufacture and disposition of intoxicating liquor —sets forth the general clause "or violates any of the provisions of this title, for which offense a special penalty is not provided, shall be fined," etc. The general clause, we submit, is limited to the same character of offenses previously specifically mentioned. The rule of **ejusdem generis** is clearly applicable.

The use of the word "offense" in the general clause clearly indicates a legislative intent to prescribe a punishment only for the violation of those forbidden or required acts in relation to manufacture, transportation or disposition of liquor, which was the purpose of the Act to regulate or prevent, and for which offenses a special penalty had not been prescribed.

It is inconceivable that Congress contemplated that the Commissioner of Internal Revenue and his subordinate officers might be repeatedly prosecuted and punished for violating the administrative provisions of the Act.

As said by Baker, District Judge, in U. S. vs. Seibert, 2 Fed. (2nd) 80,

> "If the section provides a penalty for a violation of every provision of the title not otherwise

> specially provided for, a commissioner under Section 26, discovering a person in the act of transporting liquor, and failing to seize the liquor, would be guilty of a violation of a provision of the title and subject to a fine. Section 29 provides the penalties for certain offenses denounced by the title."

If provisions of a statute, claimed to be penal, are so vague that a distinguished jurist failed to note their character, how can it be said that they are sufficiently explicit to be apparent to the common mind?

It has never been the theory of the Government that public officers will perform their duties only in fear of prosecution for derelection of duty. Only in rare instances and exclusively in matters pertaining to public revenues, is a failure to make reports made penal and in those cases the time and character of the report is clearly prescribed as well as the penalty for failure definitely expressed.

See—

> Revised Statutes 3169,
> Compiled Statutes, Section 5889.

As an argument in favor of Section 2 being construed as penal in character, in the brief of counsel representing the Government in the Court below, attention was called to the provisions of Section 3 of the Act—"All of the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented."—and the inference was sought to be drawn that if Section 2 were construed as penal in character, it would be an aid in accomplishing the pur-

poses of the Act. Just how or to what extent the use of intoxicating liquor as a beverage may be prevented, by a construction that would make it the duty of enforcement officers to become spies on each other and to deprive them of discretion in determining whether or no it might be more effective to concentrate on the sources of supply and the big offenders was not attempted to be shown, doubtless for the simple reason it could not be made so to appear.

A construction of the Act which would provide the means for meddlesome interference with the policy of executive enforcement officers would be far from a liberal construction "to the end that the use of intoxicating liquor as a beverage may be prevented."

Counsel for the Government in their brief in the Court below did not cite a single authority in support of the contention that Section 2 should be given a penal construction. With the numerous decisions cited by counsel for Plaintiff in Error in support of "certain rules of construction," they say they "have no quarrel" but that "here they have no application" because "construction is not required where the language is definite and certain as in Section 2 of the Act."

We have endeavored briefly to point out that the language of Section 2 is neither definite nor certain, and it is our contention that it was designedly made general in character in order to give enforcement officers a wide latitude of discretion essential to effective enforcement.

Even if the language of Section 2 was as definite and certain as contended, there would still remain

the question whether its violation is made penal "under the true intent and meaning of Section 29."

Courts in general and this Court in particular have so definitely laid down the rules applicable to the construction of penal statutes that we will state but a few principles deemed controlling together with a few leading authorities.

A new offense will not be deemed to have been created by statute unless the legislature has expressed its will in language sufficiently explicit to be apparent to the common mind. It is only when a statute clearly and plainly subjects parties and acts to its denunciation that they may be lawfully punished thereunder.

Connally vs. Gen. Con. Co., 70 Law Ed., 163
United States vs. Noveck, 70 Law Ed. 532
United States vs. Katz, 70 Law Ed., 554
United States vs. Reese, 92 U. S., 14.
First National Bank vs. U. S., 206 Fed., 374.

The language of a statute must be such as to leave no doubt as to the intention of the legislature and where there is a well founded doubt as to an act being a public offense it must be resolved in favor of the liberty of the citizen.

First National Bank vs. United States, supra.
United States vs. Wiltberger, 5 Wheat, 76
McCord vs. State, 101 Pacific, 280
25 R.C.L., 1083 and cases cited.

To the general proposition that penal statutes are strictly construed and that an act is not to be held to be penal in character unless the legislature has in

express language clearly made manifest its purpose, we cite the following additional authorities:

United States vs. Mo. Pac. Co., 213 Fed., 169
St. Louis Term. Co. vs. United States, 188 Fed., 191
Martin vs. U. S., 168 Fed., 198
Erbaugh vs. U. S., 173 Fed., 433
N. P. Ry. Co., vs. U. S., 213 Fed., 162
U. S. vs. Lee Huen, 118 Fed., 442
U. S. vs. Dietrick, 162 Fed., 676
Federal Cases, Nos. 14, 814
People vs. Knapp, 99 N.E. (N. Y.) 841
State vs. A. H. Read Co., 240 Pac. (Wyo.) 208
State vs. Col. Inc. Co., 124 N.W. (Wis.) 502
State vs. Breffeihl, 40 L.R.A. (N. S.) 535
Western Union vs. Axtell, 69 Ind. 199
People vs. Doyle, 110 Pac. (Cal.) 458
State vs. Eden, 158 Pac. (Wash.) 967
State vs. Furth, 144 Pac. (Wash.) 907.

Applying the principles of these authorities to the question before the Court, we respectfully maintain that all that was intended by the provisions of Section 2 of the National Prohibition Act was to invest the Commissioner of Internal Revenue and his subordinate officers with the responsibility of investigating violations of the Act and reporting them to the United States Attorney; that this intention was not enlarged or transformed into the creation of a criminal offense for neglect to discharge such responsibility by the provisions of Section 29 of the Act, for Section 29 has to do only with those offenses which have been expressly created by the Act and for which a special penalty was not prescribed and

cannot properly be construed to create any new offense not denunciated as such by the Act.

It is respectfully submitted that the question propounded by the Circuit Court of Appeals for the Ninth Circuit should be answered in the negative.

FRANK H. NORCROSS,

HENRY M. HOYT,
Attorneys for Plaintiff in Error.